

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

264

**CRM-M-53430-2019
Date of Decision : 24.01.2020**

Kulvinder @ Binder @ Gurjrati

.....Petitioner

Versus

State of Haryana and another

.....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Present : Mr. R.S. Dhull, Advocate
for the petitioner.

Mr. Vijesh Sharma, DAG, Haryana.
for respondent No.1.

None for respondent No.2.

ARUN KUMAR TYAGI, J. (ORAL)

The petitioner has filed the present petition under Section 482 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') for setting aside order dated 18.07.2019 passed in Sessions Case No.61 of 2017 titled 'State Vs. Binder @ Kulwinder' arising out of FIR No.940 dated 01.09.2015 registered under Section 302 read with Section 34 of the Indian Penal Code, 1860 (for short 'the IPC') at Police Station City, Hisar whereby application under Section 311 of the Cr.P.C. for recalling PW-5 Baru Ram for cross-examination was dismissed.

2. The above-said FIR was registered on statement of Baru Ram who alleged that on the night of 31.08.2015-01.09.2015 accused-Banti, Sonu and Binder murdered his brother Krishan Kumar by beating him. The police investigated the case and on completion of investigation charge-sheeted the petitioner-Kulvinder @ Binder @

Gurjrati along with his co-accused to face trial for alleged commission of offence punishable under Section 302 read with Section 34 of the the IPC. During trial of the case statements of three prosecution witnesses including PW-5 Baru Ram were recorded. Two formal witnesses were cross-examined by Mr. H.S. Bhura Proxy Counsel for Mr. Rakesh Kasnia, Advocate for the accused but PW-5 Baru Ram was not cross-examined by the proxy Counsel on which cross-examination of PW-5 Baru Ram was treated as nil. Thereafter, the accused filed application under Section 311 of the Cr.P.C. for recalling PW-5 Baru Ram for cross-examination. The said application was dismissed by learned Sessions Judge, Hisar vide impugned order dated 18.07.2019 on the ground that an opportunity had already been granted by the Court to the petitioner/accused to cross-examine PW-5 Baru Ram and the witness could not be made to suffer time and again by recalling him for no fault of him.

3. Feeling aggrieved accused-Kulwinder @ Binder @ Gurjrati has filed the present petition for setting aside the above-said order and allowing recalling of PW-5 Baru Ram for cross-examination.

4. The petition has been contested by the State in terms of reply filed by Sh. Ashok Kumar, HPS, Deputy Superintendent of Police, Headquarter, Hisar on behalf of respondent No.1-State.

5. Notice of the petition was given to respondent No.2/complainant-Baru Ram but none has appeared for him despite due service.

6. I have heard arguments addressed by learned Counsel for the petitioner and learned State Counsel and have gone through the

relevant record.

7. Learned Counsel for the petitioner has argued that PW-5 Baru Ram could not be cross-examined due to non-availability of the Counsel for the petitioner. The proxy Counsel cross-examined the formal witnesses but due to not being fully acquainted with the facts of the case could not cross-examine PW-5 Baru Ram. Cross-examination of the PW-5 Baru Ram is essential for just and proper decision of the case. Application filed under Section 311 of the Cr.P.C. for recalling PW-5 Baru Ram has been wrongly dismissed. The impugned order suffers from material illegality. Therefore, the impugned order may be set aside and application for recalling PW-5 Baru Ram for further cross-examination may be allowed.

8. On the other hand, learned State Counsel has argued that statement of PW-5 Baru Ram was recorded on 07.09.2018. The petitioner/accused was represented by proxy Counsel Sh. H.S. Boora for Sh. Rakesh Kashnia, Advocate and his proxy Counsel did not opt to cross examine PW-5 Baru Ram and as such his cross-examination was treated as NIL. The plea of the petitioner/accused that he was not given opportunity to cross-examine the aforesaid witness is not tenable. The impugned order does not suffer from any material illegality or irregularity. Therefore, the present petition may be dismissed.

9. Section 309 of the Cr.P.C., which empowers Court to postpone or adjourn proceedings during inquiry or trial, provides as under:-

309. Power to postpone or adjourn proceedings.

(1) In every inquiry or trial the proceedings shall be continued from day-to-day until all the witnesses in

attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:

Provided that when the inquiry or trial relates to an offence under section 376 to 376D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses.

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him:

Provided also that -

- (a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;
- (b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;
- (c) **where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.**

Explanation 1.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.—The terms on which an adjournment or postponement may be granted include, in appropriate

cases, the payment of costs by the prosecution or the accused.”
(Emphasis Supplied)

10. In *State of U.P. Vs. Shambhu Nath Singh : 2001(2) RCR*

(Criminal) 390 Hon'ble Supreme Court observed as under :-

“witnesses tremble on getting summons from courts, in India, not because they fear examination or cross-examination in courts but because of the fear that they might not be examined at all for several days and on all such days they would be nailed to the precincts of the courts awaiting their chance of being examined. The witnesses, per force, keep aside their avocation and go to the courts and wait and wait for hours to be told at the end of the day to come again and wait and wait like that. This is the infelicitous scenario in many of the courts in India so far as witnesses are concerned.....”

11. In that case, Hon'ble Supreme Court had given directions regarding examination of the witnesses in attendance and also conclusion of trial by taking up the case on day to day basis or by conducting trial by fixing dates in a session and impressed upon the Courts to avoid grant of unnecessary adjournments and take effective remedial measures by cancellation of bail or imposition of heavy costs.

12. Despite Hon'ble Supreme Court having given various directions in the catena of judgments for ensuring giving of due priority to timely examination of the witnesses, the witnesses are still harassed and every effort is made by the accused to delay their examination and more often than not the witnesses are harassed by asking them to appear again and again for their cross-examination by seeking unnecessary adjournments on the ground of non-availability of the defence counsel or even absence of one or other of the accused during trial.

13. However, the object of criminal trial is to meet out justice and to convict the guilty and protect the innocent. The criminal trial has

to be a search for the truth and not a bout over technicalities. In ***Himanshu Singh Sabharwal Vs. State of M.P. , (SC) 2008 (2) R.C.R. (criminal) 267***, Hon'ble Supreme Court observed that the fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice. In ***Natasha Singh Vs. CBI (State) (SC) 2013 (3) R.C.R. (criminal) 368*** Hon'ble Supreme Court observed as under :-

“15. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide: **Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr.**, AIR 1958 SC 376; **Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.**, 2004(2) R.C.R.(Criminal) 836 ; **Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.**, 2006(2) R.C.R. (Criminal) 448 ; **Kalyani Baskar (Mrs.) v. M.S. Sampooranam (Mrs.)**, 2007(1) R.C.R. (Criminal) 311 : 2007(1) Recent Apex Judgments (R.A.J.) 68 : (2007)2 SCC 258; **Vijay Kumar v. State of U.P. & Anr.**, 2011(4) R.C.R.(Criminal) 208 : 2011 (5) Recent Apex Judgments (R.A.J.) 147 : (2011)8 SCC 136; and **Sudevanand v. State through C.B.I.**, 2012(1) R.C.R. (Criminal) 662 : 2012(1) Recent Apex Judgments (R.A.J.) 140 : (2012)3 SCC 387).”

14. Section 311 of the Cr.P.C., which empowers the Court to summon material witness or examine person present, reads as under:-

“Any court may, at any stage of any inquiry, trial or other proceedings under this code, summon any person as a

witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.”

15. In *P. Sanjeeva Rao Vs. State of A.P. : 2012(3) R.C.R. (Criminal) 653*, the appellant was being prosecuted for offences punishable under Sections 7 and 13 (1) read with Section 13(1)(D) of Prevention of Corruption Act, 1988, before the Special Judge for CBI cases at Hyderabad. Around the time the prosecution concluded its evidence, the appellant filed Crl. Misc. Petitions No. 18 and 19 of 2011 under sections 242 and 311 Criminal Procedure Code for recall of prosecution witnesses No. 1 and 2 for cross-examination. The appellant's case in the said Criminal Misc. Petition No. 18 of 2011 was that cross-examination of PWs. 1 and 2 had been deferred till such time the Trap Laying Officer (PW 11) was examined by the prosecution and since the said officer had been examined, PWs. 1 and 2 need be recalled for cross-examination by counsel for the accused-appellant. In Crl. Misc. Petition No. 19 of 2011 the petitioner made a prayer for deferring the cross-examination of Investigating Officer (PW12) in the case till such time PWs. 1 and 2 were cross-examined. Both the applications were opposed by the prosecution. Trial Court dismissed the applications observing that what ever be the reasons for recording the cross-examination of PWs. 1 and 2 as "nil", there was nothing to show on the record that the petitioner had reserved his right to cross examine the witnesses at a later point of time. The dockets of the Court did not reflect any such intention of the petitioner. The Trial Court also held

that recall of PWs. 1 and 2 for cross-examination more than 3 and 1/2 years after they had been examined in relation to an incident that had taken place 7 years back, was bound to cause prejudice to the prosecution. The Trial Court was of the view that the appellant had adopted a casual and easy approach towards the trial procedure and that he could not ask for the recall of any witness without cogent reasons. Aggrieved by the order passed by the Trial Court the appellant filed two revision petitions before the High Court. The High Court took the view that PWs. 1 and 2 had been examined on 13th June, 2008 and 31st July, 2008 respectively followed by examination of nearly one dozen prosecution witnesses. Since it was an old case of the year 2005 and the matter was coming up for examination of the appellant-accused under Section 313 Criminal Procedure Code, there was no justification for recall of the prosecution witnesses No.1 and 2. The revision petitions were accordingly dismissed. While allowing the appeal and permitting the prosecution witnesses to be recalled for cross-examination, Hon'ble Supreme Court observed as under:-

“12. The nature and extent of the power vested in the Courts under Section 311 Criminal Procedure Code to recall witnesses was examined by this Court in ***Hanuman Ram v. The State of Rajasthan & Ors., 2008(4) R.C.R. (Criminal) 823 : (2008)15 SCC 652***. This Court held that the object underlying Section 311 was to prevent failure of justice on account of a mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses. This Court observed :

“This is a supplementary provision enabling, and in certain circumstances imposing on the Court, the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only

the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquires and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind." (emphasis supplied)

13. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in ***Hoffman Andreas v. Inspector of Customs, Amritsar, (2000)10 SCC 430***. The following passage is in this regard apposite :

"In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible." (emphasis supplied)

14. The extent and the scope of the power of the Court to recall witnesses was examined by this Court in ***Mohanlal***

ShamjiSoni v. Union of India &Anr., 1991(3) R.C.R (Criminal) 182 : 1991 Supp (1) 271, where this Court observed :

“The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair-play and good sense appear to be the only safe guides and that only the requirements of justice command and examination of any person which would depend on the facts and circumstances of each case.” (emphasis supplied)

15. Discovery of the truth is the essential purpose of any trial or enquiry, observed a three-Judge Bench of this Court in ***Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria through LRs., 2012(2) Recent Apex Judgments (R.A.J.) 6 : 2012(2) R.C.R.(Civil) 441 : 2012 (3) SCALE 550***. A timely reminder of that solemn duty was given, in the following words :

"What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice."

16. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.”

16. In *Mannan Sk. and others Vs. State of West Bengal and another : 2014(4) R.C.R.(Criminal) 617* it was held by Hon'ble Supreme Court that justice must not be allowed to suffer because of the oversight of the prosecution and in that case witness was recalled for examination after 22 years.

17. The present case is also a befitting illustration of the dilatory tactics adopted by the accused during trial to delay examination of the witness. Strictly speaking, in the facts and circumstances of the case, no sufficient ground for giving the petitioner opportunity to cross examine the complainant is made out but on taking a liberal view, the petitioner cannot be made to suffer for (mis)conduct of non appearance of his counsel in the case and also keeping in view oft quoted celebrated principles of law that justice must not only be done but must also be seen to be done, the petitioner deserves to be granted one opportunity to cross examine the complainant. No prejudice would be thereby caused to the prosecution. PW-5 Baru Ram can also be duly compensated for inconvenience and expense thereby caused by an order for payment of costs.

18. In view of the above discussion and in the interest of justice, this petition is allowed, the impugned order is set aside and application under Section 311 of the Cr.P.C. is allowed with the direction to the appellate Court to recall PW-5 Baru Ram for cross-examination and to give one opportunity to the petitioner to cross-examine PW-5 Baru Ram on payment of Rs.10,000/- as costs to him. However, for this purpose the Trial Court will not grant any further adjournment to the petitioner on the ground of absence of his counsel or

due to absence of the petitioner with application for exemption from personal appearance. The petitioner shall cooperate in recording of prosecution evidence during trial and in case of adopting of any dilatory tactics by seeking unnecessary adjournments by the petitioner, the Trial Court shall be at liberty to impose heavy costs and even cancel bail of the petitioner.

24.01.2020
Kothiyal

(ARUN KUMAR TYAGI)
JUDGE

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No